TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910. 1912

No. 916. 36

THOMAS MALONE, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED MAY 27, 1911.

(22,708)

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SUPREME COURT OF THE UNITED STATES.

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No. 310.

THOMAS MALONE, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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a United States Supreme Court.

THOMAS MALONE, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Statement.

This is an appeal from a judgment of the Court of Appeals of Kentucky, rendered on the 13th day of January, 1911, and found on page- 34 and 35 of the record, and judgment overruling petition for rehearing found on page 39 of the record, rendered on the 18th day of March, 1911. The writ of error attached to and as part of the record herein and found on page 44 having been allowed by Hon. J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky, on April 29, 1911. The assignment of error being found on page 41 and original citation on page 48, which judgment of the Kentucky Court of Appeals this court is respectfully asked to reverse.

E. L. WORTHINGTON,
W. D. COCHRAN,
J. W. COLLINS,
Attorneys for Appellant, Patrick Collins, *Maysville, Ky.*

HON. JAMES BREATHITT,
Att'y Gen. State Ky., Att'y for Appellee.

Frankfort, Ky.

1 THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

THOMAS MALONE, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Mason Circuit Court.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol in Frankfort, on the Dates Hereinafter Mentioned.

2 Be it remembered that on the 5th day of November, 1910, the appellant, by his attorney, filed in the office of the Clerk of the Court of Appeals, a transcript of the record, and which is in words and figures as follows:

3 Kentucky Court of Appeals.

THOMAS MALONE, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Statement on Appeal.

The names of the parties to this appeal are as stated in the above caption.

The judgment appealed from was rendered by the Mason Circuit Court on September 8th, 1910, at the regular September term of said Court, and may be found on page 6 of the accompanying transcript.

Appeal was prayed and granted in Court below. (See page 7 of transcript.)

Appellant resides in Maysville, Mason County, Ky. The post office address of appellee's attorney is M. J. Hennessey, Augusta, Bracken County, Ky., Commonwealth's Attorney, 19th District of Kentucky.

WORTHINGTON & COCHRAN,
J. M. COLLINS,
Attorneys for Appellant.

4 STATE OF KENTUCKY,
Mason Circuit Court:

Pleas Had Before the Honorable Chas. D. Newell, Judge of the Mason Circuit Court, at the Court House Thereof, in the City of Maysville, Ky., on the 4th Day of October, 1910.

Mason Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
against
THOMAS MALONE, Defendant.

Indictment for "Unlawfully, &c., Selling and Disposing of a Crop of Pooled Tobacco, &c."

Be it remembered that heretofore to-wit: on the 31st day of March 1909, the Grand Jury of Mason County, returned into court the following indictment, endorsed on the back thereof, "The Commonwealth of Kentucky, against Thomas Malone," Indictment for unlawfully & knowingly selling and disposing of a crop of pooled tobacco without the consent of the authorized agent selected to sell same, "A true bill, John M. Chambers, Foreman," which was ordered to be filed, and is in the following words to-wit:

The Grand Jury of Mason County, in the name and by the authority of the Commonwealth of Kentucky, accuse Thomas Malone, of the offense of Unlawfully and knowingly selling and disposing of a

crop of pooled tobacco without the consent of the agent authorized to sell and dispose of same, committed as follows, viz: The said Thomas Malone, on the — day of —— 1908, and other days
5 before and since, within eight months last past, and before the finding of this indictment in the County aforesaid, did unlawfully, and knowingly sell and dispose of a crop of pooled tobacco to-wit: about 50000 pounds of tobacco, grown in the year of 1907 by Thomas Malone, on the farm of said Malone, in Mason County, by then and there moving, taking and shipping said tobacco out of said Mason County, to some place or point unknown to the Grand Jury, and there selling and unlawfully disposing of same, to some person, firm or corporations unknown to the Grand Jury, said purchaser not being authorized by the written consent of the agent selected to sell same, to purchase said tobacco, and which said crop of tobacco, was then and there at the said time of said removal, shipping, sale and disposal, pooled tobacco, having been prior thereto regularly and legally consigned to the Burley Tobacco Society, a corporation organized and doing business under the laws of the State of Kentucky, and to the Mason County Board of Control, the authorized agent of said society, for said Mason County, a corporation organized and existing under the laws of the State of Kentucky (said corporations doing business under an act of the General Assembly, of Kentucky, permitting persons to pool their wheat, tobacco crops and other products, and sell same as a whole, and making contracts in pursuance thereof valid) for the purpose of receiving, holding, grading and selling and disposing of said crop of tobacco by Thomas Malone, who then and there, at said times, with other persons, signed and entered, the following written agreement, in words and figures as follows, to-wit:

Know all men by these presents: That whereas the Burley Tobacco Society (a branch of the American Society of Equity), and the Mason County Board of Control, have been organized and
6 -corporated under the laws of the State of Kentucky, for the purpose of assisting the growers of Burley Tobacco to realize for their tobacco fair and remunerative prices: Therefore to co-operate with and to assist said organization, to accomplish their purpose, and in consideration of the benefits to be derived from having our tobacco handled by said Board of Control, as contemplated by its charter, and sold by said tobacco society; we the undersigned growers of and owning the number of acres of Burley tobacco now growing on our respective farms as hereinafter stated, and to be raised during the year 1907, do hereby consign to said Burley Tobacco Society, our respective crops of tobacco, and do hereby constitute said society, our agent for the purpose of receiving, grading and selling the same on such terms as said society may prescribe in accordance with its charter and by laws; Provided said society shall not sell or otherwise dispose of any of said tobacco for less than fifteen cents per pound, for an average crop grown in the year 1907, for the purpose hereinbefore set out the title of said tobacco, is hereby vested in said Society. Signed, Thomas Malone 45 acres," and the said Malone by said pooling contract, above set out, pooled, pledged and signed, said tobacco crop to

and with said Burley Tobacco Society, and Mason County Board of Control, the said Malone being at the time thereof, a party to and interested in the pool, combine and agreement with numerous other persons, for the purpose of pooling their tobacco crops and securing better prices for same and the members of said pool and said Malone had prior to said sale and disposal, in consideration of benefits to be obtained, legally selected said society and said Board of Control, their and his agent for the purpose aforesaid, to sell and dispose of said crop of tobacco and said tobacco was then at the time of said sale
7 and disposal in such pool and under supervision and control of said corporations as above stated by the signing of said pooling contract, by said Malone as aforesaid, and which by its terms prohibited the sale or disposal of said tobacco, without the consent of said agent and the said Malone did unlawfully sell and dispose of said crop of tobacco, as aforesaid against the will and without the consent, either written or verbal of said authorized agent or agents or of either of them, with the intent to violate said pooling contract and to defraud said Society and Board of Control and contrary to law and against the peace and dignity of the Commonwealth of Kentucky.

M. J. HENNESSEY.
Commonwealth's Attorney.

(At a Court Begun and Held for the Mason Circuit Court on the 31st Day of March, 1910.)

Order.

Ordered that a bench warrant issue for the arrest of the defendant and that he be allowed to give bail in the sum of One Hundred Dollars.

Bench Warrant.

The Commonwealth of Kentucky to any Sheriff, Coroner, Jailer, Marshall or Policeman in this State:

You are hereby commanded forthwith to arrest Thomas Malone, and bring him before the Mason Circuit Court, to answer an Indictment, in that court against him for "Unlawfully &c. selling &c. a crop of pooled tobacco, without consent of agent &c. selected to sell same, or if the court be adjourned for the term, that you deliver him to the jailer of Mason County. Given under my hand as clerk of said court this 21 day of March 1910.

JAMES B. KEY, *C. M. C. C.*

8 *Sheriff's Return.*

Executed March 21st, 1910, by arresting Thos. Malone, and taking his bond with J. M. Collins, security for his appearance the first day of next March term of the Mason Circuit Court.

Said bond is returned herewith.

W. H. MACKOY, *S. M. C.*,
By M. BROWN, *D. S. M. C.*

Bond.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THOMAS MALONE, Defendant.

Bond.

Unlawfully and knowingly selling and disposing of a crop of pooled tobacco without consent of the agent *and* selected to sell same, and being admitted to bail in the sum of One Hundred Dollars, now we —— —— —— —— of Mason County, Kentucky, do hereby undertake that the above named Thomas Malone, will appear in the Mason Circuit Court, on the 2nd day of its next March term to answer said charge, and will at all times, render himself amenable to the orders and process of said court in the prosecution of said charge and if convicted will render himself in execution thereof, or if he shall fail to perform either of these conditions, that we will pay to the Commonwealth of Kentucky, the sum of One Hundred Dollars.

Witness our hands this 21st day of March 1910.

THOMAS MALONE.
J. M. COLLINS.

Taken by me as sheriff of Mason County.

W. H. MACKOY,
Sheriff of Mason Co.,
By MIKE BROWN, *D. C. M. C.*

(At a Court Held as Aforesaid on the 7th Day of September, 1910.)

Order Filing Demurrer.

The defendant produced his demurrer to the indictment herein, which is ordered to be filed.

9 *Demurrer.*

The defendant Thomas Malone, demurs to the indictment herein on the grounds:

1. Same does not state facts sufficient to constitute an offense committed by defendant.

2. The facts alleged show that the alleged offense if any was committed outside the jurisdiction of this court.

3. The statutes of Kentucky under which this indictment is brought are in conflict with and in violation of the Fourteenth

amendment of the Constitution of the United States in — the same deprives this defendant of the equal protection of the laws, and also of his liberty and property without due process of law and also in violation of the interstate commerce clause of the Constitution of the United States and the Sherman anti-trust Act.

J. M. COLLINS,
WORTHINGTON & COCHRAN,
Att'ys for Def't.

(At a Court Held as Aforesaid on the 8th Day of September, 1910.)

Order Overruling Demurrer.

The court having considered of defendant's demurrer to the indictment herein and being advised, overrules the same, to which defendant excepts.

(At a Court Held as Aforesaid on the Same Day and Year Aforesaid.)

Order Empaneling Jury.

This day came the defendant and plead not guilty to the indictment, whereupon came the following jury viz: Holman Bouldin, James Stone, R. W. Alexander, Chas. Haughaboo, W. W. Scott, Ferd Hechinger, Sam McNutt, H. B. Butcher, W. J. Wilson, W. J. Soward, Edward Rubenacker, and G. W. Rudy, who were duly empaneled and sworn to try the issue, at the conclusion of plaintiff's testimony, defendant produced his written motion to instruct the jury to find the defendant not guilty, the court having considered thereof, overrules the motion, to which defendant excepts, and jury aforesaid having fully heard the evidence returned the following verdict:

"We the jury find the defendant Thomas Malone, guilty and fix the fine at $150.00.

EDWARD RUBENACKER, *Foreman.*"

Judgment.

Wherefore it is adjudged by the court that the plaintiff recover of the defendant One Hundred and Fifty Dollars and the costs of this prosecution, and that the defendant be confined in the jail of Mason County, until the fine aforesaid shall be paid, but the period of such confinement, for the non-payment of the fine, shall not exceed one day for each two dollars of said fine.

(At a Court Held as Aforesaid on the Day and Year Aforesaid.)

Motion.

Following is the motion referred to in the foregoing order:

Comes defendant Thomas Malone, at the close of the testimony introduced by the Commonwealth and moves the court to instruct the jury to find the defendant not guilty of the offense charged in the indictment.

J. M. COLLINS,
WORTHINGTON & COCHRAN,
Attorneys for Def'ts.

(At a Court Held as Aforesaid on the 9th Day of September, 1910.)

Order Filing Motion, &c., for New Trial.

The defendant moves the court to set aside the verdict and judgment rendered herein, and grant him a new trial of this action and produced his reasons in writing therefor which are ordered filed.

Motion and Grounds for New Trial.

Now comes the defendant, Thos. Malone, and asks the court to set aside the verdict and judgment, rendered herein against him for the following reasons:

1. Because the verdict is against the law and contrary to the evidence.

2. Because the court erred and mis-instructed the jury in giving instruction No. 1.

11 3. Because the court erred in overruling motion of defendant to peremptorily instruct the jury to find the defendant not guilty.

4. Because the verdict shows that it was the result of passion and prejudice.

5. Because the court erred in admitting irrelevant and incompetent testimony over the objection of the defendant.

And for all other reasons apparent upon the face of the record.

WORTHINGTON & COCHRAN,
J. M. COLLINS,
Att'ys for Defendant.

(At a Court Held as Aforesaid on the 4th Day of October, 1910.)

Order Overrule *Motion for New Trial.*

The court having considered of defendant's motion and grounds for a new trial in this action and being advised, overrules the motion to which defendant objects and excepts, and prays an appeal to the

Court of Appeals, which is granted on condition that he lodge in the Clerk's office, of said court, a transcript of the record in sixty days from the date of judgment.

(At a Court Held as Aforesaid on the 6th Day of October, 1910.)

Order Tender *Bill of Exceptions.*

The defendant produced and tendered to the court his certain bill of exceptions herein, and moved the court to sign and seal same and make it a part of the record, and on motion of plaintiff further time is given her to examine and complete same.

(At a Court Held as Aforesaid on the 10th Day of October, 1910.)

Order Filing Bill of Exceptions.

The defendant Thomas Malone having on a former day of this present term tendered his bill of exceptions, together with a transcript of the evidence herein and moved the court to file same and same having been duly examined and approved, it is ordered to be filed and is signed by the court.

12 Said Bill of Exceptions and Transcript of Evidence are as follows:

Mason Circuit Court.

No. 5.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THOMAS MALONE, Defendant.

Transcript of Evidence & Bill of Exceptions.

Be it remembered that at the September 1910 term of the Mason Circuit Court, the above styled cause came up to be heard, and plaintiff to support the issues on its part, introduced the following witnesses:

The witness S. A. SHANKLIN, who being first duly sworn testified as follows.

By M. J. HENNESSEY:

Q. 1. You were Chairman of the Board of Control in Mason County for the Burley Tobacco Society in 1907 and 1908, were you not?

A. Yes sir.

Q. 2. At the time, did the farmers of this county, a number of

them, pool their tobacco, with the Burley District Society for which the Mason County Board of Control is agent?

A. Yes sir for the 1907 crop.

Q. 3. Was the tobacco crop of Thomas Malone pooled?

A. Yes sir.

Q. 4. How many acres if you remember?

A. His individual crop was 45 acres.

Plaintiff here offers to introduce the contract in evidence, to which defendant objects on the ground that it is not the contract set out in the indictment.

Q. 5. Do you know where the original contract is, Mr. Shanklin?

A. Not without looking for it. I don't — whether it is in town or not.

13 Q. 6. Where could you find out about the original contract?

A. Mr. Kehoe would know about it.

Q. 7. Will you see Mr. Kehoe and if you can produce the original contract bring it here?

A. Mr. Shanklin after seeing Mr. Kehoe, produces the original contract and offers to make same a part of the evidence, which is done, and said contract, was read in evidence and is in words and figures as follows:

Know all men by these presents, That whereas, the Burley Tobacco Society (a branch of the American Society of Equity) and the Mason County Board of Control have been organized and incorporated under the laws of the State of Kentucky, for the purpose of assisting the growers of Burley tobacco to realize for their tobacco fair and remunerative prices; Therefore, to co-operate with, and to assist said organizations to accomplish their purposes, and in consideration of the benefits to be derived from having our tobacco handled by said Board of Control, as contemplated by its charter, and sold by said Tobacco Society, we the undersigned growers of, and owning the number of acres of Burley Tobacco on our respective farms, as hereinafter stated, and to be raised during the year 1907, do hereby consign to said Burley Tobacco Society, our said respective crops of tobacco, and do hereby constitute said society our agent, for the purpose of receiving, grading and selling, the same on such terms, as said Society may prescribe, in accordance with its charter and by-laws: Provided said Society shall not sell, or otherwise dispose of any of said tobacco for less than fifteen cents per pound, for an average crop grown in the year 1907. For the purpose as hereinbe-

14 fore set out the title to said tobacco is hereby vested in said Society.

Name.	Post Office.	County.	Acres.
Thomas Malone		Mason	45

NOTE.—Any person or persons having a crop of tobacco raised in 1906, not now pledged to the Burley Tobacco Society, may pledge the same to said Society; Provided he or they also pledge his or their crops of 1907 tobacco to the said Society.

Q. 8. State if this is the contract pooling 45 acres of Mr. Malone's tobacco?

A. Yes, sir, I*t* think it is.

Plaintiff offers another contract and to introduce it and make same part of the evidence, to which defendant objects; the court overrules the objection, to which defendant excepts, and the contract is considered in evidence as follows:

This writing witnesseth, that whereas the Mason County Board of Control and the Burley Tobacco Society, having sued out an injunction against Charley Daugherty, restraining him from delivering his crop of tobacco raised during the year 1907, upon the farm of Thomas Malone in Mason County, Kentucky, and whereas Thomas Malone having pooled with the Burley Tobacco Society and the Mason County Board of Control 45 acres of tobacco, being raised upon his farm during the year 1907, said 45 acres, including the crop belonging to Charles Daugherty, and it appearing that Thomas Malone has purchased from his tenants a sufficient acreage of tobacco to constitute 45 acres without counting the one-half interest owned by said Daugherty, and which was enjoined in the action above referred to. It is now agreed that Thomas Malone will deliver to the Board of Control for the Burley Tobacco Society, the product of 45 acres of Burley Tobacco grown during the year 1907 upon his farm, and does hereby constitute said Board of Control and the Burley Tobacco Society his agents for the purpose of receiving grading and selling said tobacco in accordance with the charter, rules and by-laws of said Board of Control and Burley Tobacco Society, in consideration of which it is agreed that the injunction suit against Charles Daugherty shall be dismissed, and he is permitted to dispose of the tobacco enjoined in the action referred to above.

Signed in duplicate this March 11th 1908.

THOMAS MALONE.
T. D. SLATTERY,
Att'y for Mason County Board of Control and Burley Tobacco Society.

Q. 9. That is the 1907 crop?

A. Yes sir.

Q. 10. The 1907 crop was all sold how long ago?

A. It was sold I think in December 1908.

Q. 11. And all that crop that was received by the Burley District Society, has been disposed of hasn't it?

A. Yes, sir, all except what is in court unsettled. It has been disposed of so far as the sale is concerned.

Q. 12. I mean all the tobacco pooled in this county?

A. Yes sir, a long while ago.

Q. 13. Was notice given in all the County papers for these people to bring their tobacco in?

A. I won't say all, but I think in two; the Bulletin and Ledger.

Q. 14. Do you know whether or not Mr. Malone ever brought his

tobacco in under this contract and delivered it to the Mason County Board of Control or Burley District Society?

A. Not to my knowledge.

16 Q. 15. Did you ever have any conversation with him after that in regard to it?

A. No sir.

Q. 16. You are an officer and had charge of those books and everything and were an officer at that time?

A. Yes sir.

Q. 17. Would you have known if it had been?

A. Yes sir.

Q. 18. You don't know what became of this tobacco?

A. No sir.

Q. 19. This Burley Tobacco Society and Board of Control are corporations under the law of Kentucky, are they not?

A. Yes sir.

Q. 20. This tobacco referred to in this contract, the 1907 crop owned by Mr. Malone, was pooled, with the tobacco of other tobacco growers of Mason and other Counties for the purpose of obtaining — for same?

A. Yes sir.

Defendant objects to the foregoing question and answer, court overrules the objection to which the defendant excepts.

Q. 21. Do you know that Mr. Malone received the same kind of notice the other tobacco poolers of Mason County received?

A. Yes sir.

Q. 22. And never delivered his tobacco?

A. Yes sir.

Cross-examination by M. J. COLLINS:

Q. You speak of certain tobacco the Equity didn't sell or deliver?

A. None they didn't deliver; I said it was all settled for except that in the courts. They have delivered everything but it is not all settled for.

17 Q. 2. How much is that?

A. I don't know you will have to go to headquarters to find out.

Q. 3. Several million pounds?

Plaintiff objects to question; court sustains objection to which defendant excepts.

Q. 4. There was a part of the tobacco in the pool you didn't get delivered?

A. A part of it was refused, because, they claim, of the condition of the tobacco, that is the independents who purchased it, not on our part. They offered and tendered it and did finally — it and then sued for the difference on the ground that the funk in the tobacco depreciated the value.

Q. 5. That was a large quantity of tobacco?

A. No, sir, it was only in the first place about one-fourth of the aggregate amount, and of course there could not be a great quantity in dispute, but what that was I don't know.

Q. 6. It is one-fourth of about 80,000,000 pounds?

A. Plaintiff objects to the question, court sustains objection, to which defendant excepts.

Further sayeth not S. A. Shanklin.

Also the witness PATRICK COLLINS, who being first duly sworn, testified as follows:

Q. 1. You are acquainted with the defendant Thos. Malone are you?

A. Yes sir.

Q. 2. How close did you live to him in 1907 and 1908?

A. About six miles.

Q. 3. Do you know how much tobacco he raised that year?

A. No.

18 Q. 4. Do you know he had a tobacco crop?

A. Yes sir.

Q. 5. Do you know it was pooled tobacco?

A. No, sir, well,—nothing more than I heard him say it was, and others too.

Q. 6. You remember when he signed?

A. No sir.

Q. 7. Do you know of his shipping his tobacco away?

A. No sir.

Q. 8. What did he tell you of shipping his tobacco to Louisville, or wherever he shipped it?

A. He told — they would cancel his insurance on the barn near the railroad out there?

Q. 9. Did he ship his tobacco to Louisville?

A. Yes sir.

Q. 10. Do you know about how many car loads there were?

A. No sir.

Q. 11. What price did he say he got for it in his talks with you?

Defendant objects to question, court sustains objection to which plaintiff excepts.

Q. 13. Did you or not ever hear Mr. Malone say he ever sold his tobacco or disposed of it?

A. Yes sir, I heard him say.

Q. 14. Did he ever tell you what price he got for it?

A. Defendant objects to the question.

By the COURT: He can answer without stating the price.

A. Yes sir.

19 Q. 15. Did he tell you who he sold it to?

A. No sir he didn't.

Q. 16. Did he tell you he sold it at Louisville?

A. No sir, he didn't tell me that.

Q. 17. What did he say to you about it: tell the conversation you had with him with reference to his tobacco after it left here?

A. I don't remember just what the conversation was. I had a talk with — at different times and I understood the tobacco was sold through his conversations, but what day or month it was I don't know.

Q. 18. Did you know through his conversations who it was sold to?

A. No sir, I don't suppose he knew himself; I don't see how he could.

Q. 19. Where was it sold and how?

A. Through the warehouse at Louisville?

Q. 20. Do you know what warehouse?

A. The one on Main Street.

Q. 21. Do you remember about what time this tobacco was taken from Mason County?

A. No sir.

Q. 22. How soon before that tobacco was shipped was it?

A. Sometime in the fall of 1908, but I don't remember the month or day.

Further sayeth not Patrick Collins.

20 Also the witness, DAVID WELLS, who being first duly sworn, testified as follows.

By M. J. HENNESSEY:

Q. 1. What is your name?

A. David Wells.

Q. 2. Do you remember loading any tobacco or helping Tom Malone load tobacco in 1908 near his place?

A. Yes sir.

Q. 3. Was that equity tobacco, pooled tobacco?

A. I guess it was.

Q. 5. Who helped you load that tobacco?

A. Jack Walton and Pat Gerain and Mr. Brumhough and one of his sons and David Green, father and myself.

Q. 6. What station is there there?

A. Clark station.

Q. 7. Was Mr. Malone's barn where this tobacco was near the track?

A. There is a warehouse there, but I forgot whose it is.

Q. 8. How far is the warehouse from the railroad?

A. Pretty close.

Q. 9. Do you remember how many cars or hogheads were required to take that tobacco?

A. No sir, I don't.

Q. 10. Don't you know about how many?

A. No sir, I don't.

Q. 11. You hauled this tobacco from the warehouse to the cars on the L. & N. road and helped put it in there?

Defendant objects to the question.

A. It was close to the railroad and we didn't have to haul it, we just put it on the cars.

21 Q. 12. Was that the last you saw of that tobacco?

A. I guess it was.

Q. 13. When was that,—this last fall or the fall before that; was it the fall of 1908 when this tobacco was loaded?

A. I guess it was about that time, as near as I can remember.

Q. 14. What time did you load that tobacco?

A. In the day time.

Q. 15. Do you remember who that tobacco was billed to, if any one?

A. No sir, I do not.

Q. 16. You can't remember about how many hogsheads there were?

A. No sir, I can't.

Q. 17. Were there a number of hogsheads?

A. I don't know whether there were or not.

Q. 18. Do you know where the tobacco came from in that warehouse?

A. It came from different places.

Q. 19. Name the places.

A. I can't remember now what places it did come from.

Q. 20. Was any of the tobacco raised on Mr. Malone's farm put in that warehouse?

A. Yes sir, I guess it was.

Q. 21. Was that tobacco raised in 1907 on Mr. Malone's place?

Defendant objects to the question.

A. I don't know whether it was or not.

Q. 22. Do you or not know whether or not, all the tobacco raised by Mr. Malone on his place in 1907, was put in that warehouse and prized there?

A. I don't remember.

22 Cross-examination by J. M. COLLINS:

Q. 1. There was a good deal of tobacco shipped from that warehouse during that year, wasn't there, at different times during the year wasn't there?

A. I don't know sir, whether there was or not, I helped load some there and that is all I know about it.

Q. 2. Further sayeth — Davis Wells

Also the witness JNO. WELLS, who being first duly sworn, testified as follows:

Q. 1. Did you work for Thomas Malone in 1907 or 1908?

A. I don't remember working for him regularly, but did some work.

Q. 2. Do you know anything about the tobacco raised on his place in 1907?

A. I don't know particularly about it.
Q. 3. Do you know where that tobacco went to?
A. I don't know.
Q. 4. Do you know if tobacco was raised there?
A. I don't know.
Q. 5. Do you know about tobacco being shipped from the warehouse in 1908?
A. Yes sir, I know of some being shipped.
Q. 6. Did you help house the tobaco raised on Mr. Malone's place in 1907?
A. I am not certain about what year it was.
Q. 7. You know there wasn't any raised in 1908 don't you?
A. Yes sir.
Q. 8. How about the year before that?
A. Yes sir.
23 Q. You did?
A. Yes sir.
Q. 10. Where was it housed?
A. Well, it was housed on his farm.
Q. 11. Did you have to do with taking that tobacco off his farm?
A. I don't know anything only I helped load it.
Q. 12. Where did you load it?
A. At Slerk's Station.
Q. 13. What did you load it on?
A. Loaded it in a car.
Q. 14. A car of the L. & N. Railroad?
A. I believe that is the name.
Q. 15. Do you know which way it went?
A. It went up the road.
Q. 16. Towards Paris?
A. Yes sir.
Q. 17. Do you know about how many cars it took?
A. I don't.
Q. 18. Were there many of them or just one or two?
A. There were more than one or two, but I don't know how many.
Q. 18*a*. Do you know how many hogsheads there were?
A. I don't.
Q. 19. How long did it take you to load them?
A. I don't know.
Q. 20. Was it a day?
A. No sir, it wasn't a half a day.
24 Q. 21. Have you any recollection at all about the number of cars, was it more than one car?
A. I am not sure, there may have been two or three cars.
Q. 22. Do you know how many hogsheads you put in a car?
A. I don't know.
Q. 23. Have you any judgment about that, as to how many you put on?
A. No sir, I have not.

Q. 24. This loading was it or not done in the fall of 1908, the year the tobacco was cut out?

A. I couldn't tell you whether it was in the fall or not.

Q. 25. It was this tobacco raised on Tom Malone's place in 1907, wasn't it?

A. Yes sir.

Cross-examination by J. M. COLLINS:

Q. 1. Did you ever hear Mr. Malone say the insurance was canceled on his tobacco?

A. I heard him say——

Plaintiff objects to the question. Plaintiff objects to the answer.

Q. 2. Did you hear Mr. Malone say he had to ship his tobacco because the insurance was canceled?

A. I heard him say that, sir.

Plaintiff objects to the question, court sustains the objection, to which defendant excepts.

Further sayeth not Jno. Wells.

Also the witness URIAL MCDANIEL, who being first duy sworn, testified as follows:

Q. 1. Do you know anything about Mr. Malone shipping some tobacco from Clark's Station in 1908, or having any tobacco loaded there?

A. No sir.

Q. 2. Did you see any hauling of tobacco there in the fall of 1908, to Clark's station from Malone's warehouse near Clark's station?

A. Yes sir.

Q. 3. About what time in the year was that?

A. I couldn't say.

Q. 4. What did you see there?

A. I saw a crop hauled from where I lived on the adjoining place to the warehouse at Clark's station.

Q. 5. What crop was that, was that Mr. Malone's crop of 1907?

A. Yes sir the crop Mr. Daugherty raised for Mr. Malone.

Further saith not Uriah McDaniel.

The witness S. A. SHANKLIN having been recalled testified as follows.

Q. 1. Did the Mason County Board of Control for the Burley Tobacco Society or any of its agents, ever direct Malone to ship his tobacco out of this county, or sell same?

A. They did not.

Q. 2. Did they ever give written or verbal permission for him to do so?

A. They did not.

Further sayeth not S. A. Shanklin.

The witness, JNO. WELLS, having been recalled, testified as follows.

Q. 1. The tobacco you have testified in regard to, raised on Tom Malone's place in 1907, and which you hauled to this warehouse and helped to load, was that warehouse in Mason county?

A. Yes sir.

Q. 2. And the tobacco was raised in Mason county on Tom Malone's farm?

26 A. Yes sir.

The foregoing was all the evidence offered in the case.

Motion.

At the conclusion of the evidence offered by plaintiff, the defendant made the following motion.

Comes the defendant, Thomas Malone, at the close of the testimony introduced by the Commonwealth and moves the court to intruct the jury to find the defendant not guilty of the offense charged in the indictment.

J. M. COLLINS,
WORTHINGTON & COCHRAN,
Attorneys for Defendant.

Which motion the court overrules, to which ruling of the court the defendant objected and excepted and still excepts.

Thereupon the Commonwealth requested the court to give the jury the following instructions, being number- 1 and 2:

Instructions.

"The court instructs the jury that if they believe from all the evidence beyond a reasonable doubt, that the defendant, Thomas Malone in this County, at any time within twelve months last past, before the finding of the indictment herein, did wilfully and knowingly take, haul and remove, out and from Mason county, Kentucky, the tobacco crop described in the indictment and proof herein, with the fraudulent intent, at the time to sell and dispose of said tobacco in violation of a contract, pooling same and did subsequent thereto and in pursuance of said removal, wilfully and knowingly, sell and dispose of said tobacco, to some person, corporation or company,

27 unknown and that said tobacco was at the time of said removal and sale pooled tobacco theretofore, and then by written contract of the said Thomas Malone, with the tobacco crops of other tobacco growers, pledged to the Burley Tobacco Society, and the Mason County Board of Control, as agents for the purpose of classifying, grading, storing, holding, selling, and disposing of same, and for the purpose of obtaining fair and remunerative prices for same, and that said removal, taking, and hauling out of said county and said sale, if any sale and removal there was, was without the written consent of said agents, or of either of them, and with the

fraudulent intent to violate said contract of the said Thomas Malone, with the said agents, pooling said crop, if any contract there was, then the *the* jury should find the defendant guilty, as charged in the indictment and fix his punishment at a fine at any amount, not exceeding the sum of $250.00, in their discretion.

Instruction No. 2.

Unless the jury believe from all the evidence beyond a reasonable doubt, — has been proven guilty they should find him not guilty.

To the giving of which instructions, and each of them, the defendant objected, the court overruled defendant's objection and gave said instructions, to which the defendant excepted at the time and still excepts. These were all the instructions to the jury that were given, asked or refused.

Thereupon said case being submitted to the jury, the jury retired and afterwards returned into court the following verdict:

We the jury find the defendant Thomas Malone, guilty and fix the fine at $150.00.

ED. RUBENACKER, *Foreman.*

28 And thereupon the defendant on the — day of — — and within three days from the rendition of said judgment and verdict filed his motion and grounds for a new trial herein, which motion was on the — day of —— overruled by the court, to which ruling of the court defendant objected and excepted, and prayed an appeal to the Court of Appeals which was granted.

Said motion and grounds for a new trial reads as follows:

Now comes the defendant, Thos. Malone, and asks the court to set aside the verdict and judgment rendered herein against him for the following reasons:

1. The verdict is against the law and contrary to the evidence.
2. Because the court erred and mis-instructed the jury in giving instruction Number 1.
3. Because the court erred in overruling motion of defendant to peremptorily instruct the jury to find defendant not guilty.
4. Because the verdict shows that it was the result of passion and prejudice.
5. Because the court erred in admitting irrelevant and incompetent testimony over the objection of the defendant, and for all other reasons apparent upon the face of the record.

WORTHINGTON & COCHRAN,
J. M. COLLINS,
Att'ys for Def't.

29–31 Thereupon the defendant Thomas Malone presents to the court this his Bill of Exceptions, accompanied by the official transcript of evidence and same are approved and signed by the court and are filed as part of the record herein for use in the Court of Appeals.

C. D. NEWELL,
Judge Mason Circuit Court.

STATE OF KENTUCKY,
Mason Circuit Court:

I James B. Key, clerk of the Mason Circuit Court. do hereby certify that the foregoing and annexed 22 pages contain a full, true and complete transcript of the record and proceeding had in said court in the case therein mentioned.

JAMES B. KEY, *Clerk.*

Fee for record $7.70.

* * * * * * *

32 Be it remembered that on the 2nd day of January, 1911, at a Court of Appeals held at the Capitol, in Frankfort, the following order was entered:

MALONE
v.
COMMONWEALTH.

Mason.

On the call of the docket it is ordered that the above case be and the same is submitted.

33 Be it remembered that on the 13th day of January, 1911, at a Court of Appeals held at the Capitol, in Frankfort, the following judgment was entered:

THOMAS MALONE, Appellant,
vs.
COMMONWEALTH, Appellee.

Appeal from Mason Circuit Court.

The Court being sufficiently advised, it seems to them that there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said Court.

It is further considered that appellee recover of appellant all its costs herein.

And on said date the Court delivered the following opinion.

34 Court of Appeals of Kentucky.

JANUARY 13, 1911.

THOMAS MALONE, Appellant,
v.
COMMONWEALTH, Appellee.

Appeal from Mason Circuit Court.

Opinion of the Court by Judge Settle.

The appellant was tried and fined $150.00 in the court below under an indictment charging him with the offense of selling and disposing of a crop of pooled tobacco in violation of section 3941*a* Kentucky Statutes, and by this appeal seeks a reversal of the judgment of conviction.

The record fails to disclose any error committed by the trial court to the appellant's prejudice, and the law and facts of the case being in all respects similar to those of the case of Patrick Collins v. Commonwealth, the opinion in which was this day handed down, and which is conclusive of this case, no reason is perceived for ex
35 tending the opinion herein further than to adopt and reaffirm the conclusions expressed in that of the Collins case, which is accordingly done.

The judgment, is therefore, affirmed.

JAMES BREATHITT,
Attorney General;
TOM B. McGREGOR,
Ass't Att'y Gen'l;
M. J. HENNESEY,
For Appellee.

J. M. COLLINS,
WORTHINGTON & COCHRAN,
For Appellant.

[Endorsed:] Jan. 13, 1911. Malone vs. Commonwealth.

36 Be it remembered that on the 17th day of February, 1911, at a Court of Appeals held in the Capitol, in Frankfort, the following order was entered:

MALONE
v.
COMMONWEALTH.

Mason.

Came appellant by counsel and filed motion and given twenty days' extension to file petition for rehearing herein.

The said motion is as follows:

37 Kentucky Court of Appeals.

THOMAS MALONE, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Motion.

Now comes the Appellant, Thomas Malone, and moves the Court for an extension of time of twenty days in which to file a petition for rehearing in this cause for the reason that said additional time is necessary in order to have said petition printed.

WORTHINGTON & COCHRAN,
J. M. COLLINS,
Att'ys for Appellant.

Notice is accepted and copy waived.

TOM B. McGREGOR,
Ass't Att'y Gen'l.
Att'y for Commonwealth.

38 Be it remembered that on the 14th day of March, 1911, at a Court of Appeals held in the Capitol, in Frankfort, the following order was entered:

MALONE
v.
COMMONWEALTH.

Mason.

Came appellant by counsel and filed petition and notice, and moved for a rehearing herein, which motion is submitted.

(The petition for rehearing is not copied into this record as per agreement on file—Clerk.)

39 Be it remembered that on the 18th day of March, 1911 at a Court of Appeals, held in the Capitol, in Frankfort, the following order was entered:

MALONE
v.
COMMONWEALTH.

Mason.

The Court being advised, appellant's petition for rehearing herein is overruled.

40 Be it remembered that on the 29th day of April, 1911, there was filed in the office of the Clerk of the Court of Appeals, an Assignment of Errors, and which is hereto attached and is as follows:

41 Court of Appeals of the State of Kentucky.

STATE OF KENTUCKY ex Rel. THOMAS MALONE, Plaintiff in Error.
vs.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of the State of Kentucky in the above entitled matter there is manifest error in this, to-wit:

First. The court erred in holding that the provisions of Chapter 103*a* being §3941*a*, Carroll's Kentucky Statutes, and being the Act of March 21, 1906, and the amendment thereto of March 13, 1908, of the general laws of the State of Kentucky for the year 1908 and subsequent are not in conflict with and in violation of the provisions of the 14th Amendment of the Constitution of the United States, for that the State of Kentucky by and through the provisions of said Chapter 103*a* assumes and seeks,

(1) To deprive the plaintiff in error and certain other citizens of the United States and of the State of Kentucky of rights, privileges and immunities secured to other citizens of the United States and said state;

(2) To deprive the plaintiff in error and other citizens of the United States of liberty and property without due process of law;

(3) To deprive and to deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of Kentucky of the equal protection of the law.

Second. The court erred in holding that by the provisions of said act the plaintiff in error is not deprived of rights privileges and immunities secured to other citizens of the United States and the State of Kentucky, by the Federal Constitution and laws of the United States.

Third. The court erred in holding that by the provisions of said act the plaintiff in error is not deprived of liberty and property without due process of law.

Fourth. The court erred in holding that the provisions of the act do not deny to the plaintiff in error the equal protection of the law.

Fifth. The court erred in holding that the said act and the authority exercised thereunder, and thereby authorized to be exercised thereunder, is within the police powers of the legislature of the State of Kentucky.

Sixth. The court erred in holding the provisions of said act making it unlawful for the plaintiff in error to ship his tobacco out of Mason County, or sell same without first obtaining the consent
42 of the American Society of Equity, or the Mason County Board of Control, to be within the police powers of the state.

Seventh. The court erred in holding the provisions of said act requiring plaintiff to procure said consent before shipping his tobacco to Louisville, Ky., or selling it there, not to be an abridgement of the inalienable and constitutional right of plaintiff in error to pursue a lawful avocation in a lawful way without interference by the state.

Eighth. The court erred in holding that the provisions of said act do not unlawfully discriminate between those engaged in producing, handling or selling "pooled tobacco" and those engaged in producing, handling or selling other personal property.

Ninth. The court erred in holding that the provisions of said act do not cast special burdens upon those engaged in producing, handling or selling "pooled tobacco" in excess of those cast on persons producing, handling or selling other personal property or farm products.

Tenth. The court erred in holding that said act does not grant special and exclusive privileges to certain citizens which it denies to the plaintiff in error and to other citizens of the state.

Eleventh. The court erred in holding that the provisions of said act are uniform in their operation throughout the state upon all citizens of the state similarly situated, and that it does not deprive the plaintiff in error of the right to earn a livelihood in the pursuit of a lawful and harmless occupation and of the liberty of contract in reference to said business.

Twelfth. The court erred in holding that the provisions of said Chapter 103*a* are not in violation of Section 8, Articles 1, of the Constitution of the United States, which confers on Congress the exclusive power to regulate commerce among the several states.

Thirteenth. The court erred in holding that the provisions of said Chapter 103*a* are not in violation of the provisions of the Act of Congress of 2 day of July, 1890, commonly known as the "Sherman Anti-Trust Act."

Fourteenth. The court erred in ordering judgment to be entered assessing and confirming a fine against the plaintiff in error.

Fifteenth. The court erred in ordering judgment to be entered and in entering judgment against the plaintiff in error.

WORTHINGTON & COCHRAN,
J. M. COLLINS,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed Apr. 29, 1911. Napier Adams, C. C. A.

43 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error from the Supreme Court of the United States, and order allowing the writ and which is hereto attached, as follows:

44 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because *of* the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Court of Appeals of the State of Kentucky before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Thomas Malone and the Commonwealth of Kentucky, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity, and wherein was drawn in question the validity of a statute of, and an authority exercised under said state on the ground of their being repugnant to the Constitution, treaties and laws of the United States, and the decision was in favor of such, their validity, and wherein was drawn in question the construction of a clause of the Constitution or of a treaty or a statute of, or a commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up and claimed under such clause of said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of said Thomas Malone, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have the same at Washington on the 29 day of May 1911, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Edward D. White, Chief Justice of the Supreme Court the 29 day of April, in the year of our Lord, 1911.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,
Clerk United States Circuit Court, Eastern Dist. of Ky., at Frankfort.

April 29, 1911.

Allowed by
J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

[Endorsed:] Filed Apr. 29, 1911. Napier Adams, C. C. A.

45 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error Bond, and which is in words and figures as follows:

46 Know all men by these presents that Thomas Malone, as principal and Patrick Collins, as surety, both of Mason County, Ky., are held and firmly bound unto the Commonwealth of Kentucky in the sum of Five Hundred Dollars ($500.00), to be paid to the said Commonwealth of Kentucky; to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 29 day of April, 1911.

Whereas, the above named plaintiff in error, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute said writ of error to effect, and answer all costs and damages if he should fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

THOS. MALONE.
PATRICK COLLINS.

STATE OF KENTUCKY,
County of Mason:

On this 29 day of April, 1911, before me personally appeared Thomas Malone and Patrick Collins, to me known to be the persons described in, and who executed the foregoing bond, and each severally made oath that the said Thomas Malone was the owner of real and personal property located in Mason County, Ky., of value in excess of the sum of Thirty Thousand Dollars, ($30,000.), and that the said Thomas Malone is worth beyond his debts and exemptions more than the sum of $10,000., in property which would be subject to execution, and that the said Patrick Collins is the owner of real and personal property, located in Mason County, Ky., of value in excess of the sum of Ten Thousand Dollars, ($10,000.), and that the said Patrick Collins is worth beyond his debts and exemptions more than the sum of $1,000. in property which would be subject to execution, and each of said parties acknowledged that the execution of the foregoing bond is his free act and deed.

[SEAL.]

JAS. B. KEY,
Clerk of the Mason Circuit Court.

The proceedings of this Court are stayed.

I hereby approve the foregoing bond and sureties this 29th day of April, 1911.

J. P. HOBSON,
Chief Justice Court of Appeals of the State of Kentucky.

47 And on said date there was filed in the office of the Clerk of the Court of Appeals, the original Citation, with proof of service endorsed thereon, and which is hereto attached as follows:

48 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Kentucky and Hon. James Breathitt, Attorney General, Greeting:

You are hereby cited and admonished to be and appear at as Supreme Court of the United States at Washington within (30) thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of the State of Kentucky, wherein state of —— ex rel. Thomas Malone is plaintiff in error, and the Commonwealth of Kentucky is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of the State of Kentucky, this 29 day of April, in the year of our Lord, one thousand nine hundred and eleven.

J. P. HOBSON,
Chief Justice Court of Appeals of the State of Kentucky.

Copy of the above citation received and accepted this 29 day of April, 1911, at the office of the attorney general of the State of Kentucky.

JAMES BREATHITT,
Attorney General

[Endorsed:] Filed Apr. 29, 1911. Napier Adams, C. C. A.

49 COMMONWEALTH OF KENTUCKY,
The Court of Appeals, ss:

In obedience to the commands of the within Writ of Error I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings (except the petition for rehearing) in the case named in said Writ of Error, with all things concerning same.

In witness whereof, I have hereunto set my hand and affixed the seal of my office. Done at the Capitol in Frankfort, this the 12th day of May, 1911.

[Seal Kentucky Court of Appeals.]

NAPIER ADAMS,
Clerk Court of Appeals of Kentucky.

Endorsed on cover: File No. 22,708. Kentucky Court of Appeals. Term No. 310. Thomas Malone, plaintiff in error, vs. The Commonwealth of Kentucky. Filed May 27th, 1911. File No. 22,708.

Supreme Court of the United States

OCTOBER TERM, 1913

No. 36

Thomas Malone, ... *Plaintiff in Error,*

v.

Commonwealth of Kentucky, . . *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT

May it Please the Court:

This writ of error is prosecuted to reverse a judgment of the Court of Appeals of Kentucky rendered January 13, 1911, which affirmed a judgment of the circuit court of Mason county, Kentucky, (page 6 of transcript,) by which plaintiff in error was indicted and convicted for a violation of the statutes of Kentucky, making it a penal offense to sell pooled farm farm products, and fined $150.

The Kentucky statute under which the indictment and conviction were had is *Chap. 103a, Sec. 3941a, Kentucky Statutes*, Carroll's edition, and is the Act of March 21, 1906, (Session Acts of 1906, Chapter 117,) as amended by Act of March 13, 1908, (Session Acts of 1908, Chapter 7, page 38.)

Said Act, as amended, reads as follows:

"It is hereby declared lawful for any number of persons to combine, unite or pool, any or all of the crops of wheat, tobacco, corn, oats, hay, or other farm products raised by them, for the purpose of classifying, grading, storing, holding, selling or disposing of same, either in parcels or as a whole, in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually.

"That contracts or agreements made or entered into by persons with each other, the object or intent of which is to unite, pool or combine all or any of the crops of tobacco, wheat, corn, oats, hay or other farm products, raised by such persons, for the purpose of classifying, grading, storing, holding, selling or disposing of said crops, or any of them, either in parts or as a whole, in order, or for the purpose of obtaining a better or higher price therefor than could or might be obtained by selling said crops separately or individually, are hereby permitted, and shall not, because of any such combination or purpose of said persons, be declared illegal or invalid.

"Such persons so entering into such an agreement or contract as is set out in the foregoing sections are hereby permitted to select an agent or agents through or by or with whom said parties so entering into such agreement may classify, grade, store, hold, sell, or dispose of said crop, or any of them, and said agent or agents shall have the right to take, receive, hold, store, classify, grade, sell

or dispose of said crop so placed in said agreement, for the purpose of accomplishing the object of such combination or agreement between such principals, and contracts and agreements entered into by such agent or agents for the purpose of classifying, grading, storing, holding, selling or disposing of said crop so combined, united or pooled, either in parcel or as a whole, are hereby permitted, and shall not, because of any such combination or purpose of such original agreement of such principals so entering into said combination, or of such agent or agents, be declared illegal or invalid. All contracts heretofore made by any person or persons for the purposes set out in the foregoing sections are hereby declared valid, if otherwise legally binding on the parties. To prevent any breach or violation of any contract made for the purposes set out in the foregoing sections, a restraining order and writ of injunction may be issued by proper officer, as prescribed in the Civil Code of Practice.

"For any breach or violation of any contract entered into for the purposes set out in the foregoing sections, the injured party may recover the damages sustained by him by reason of such violation of such contract of the person violating the same, and also of any person who shall induce or persuade another to violate such contract, which damages shall include the reasonable expense and attorney's fees incurred by the injured party in prosecuting an action to recover such damages, or to prevent a violation of such contract, if the party complaining shall succeed in doing so, which may be recovered in the same action or original proceeding. Said agent when so selected as herein provided shall have the sole right to sell said crop so pooled or combined, and it shall be unlawful for any owner of such crop to sell or dispose of same and for any person to knowingly purchase the same without the written consent of such agent, and upon conviction thereof he or they

shall be fined in any sum or amount not exceeding $250 for each offense, to be fixed by the jury in their discretion."

The indictment alleged that plaintiff in error unlawfully sold and disposed of a crop of pooled tobacco in 1909, by shipping it out of Mason county, Kentucky, to some place unknown to the grand jury, and there selling it. (Page 3 of transcript.) The proof shows that plaintiff in error, after pooling his tobacco crop, shipped it from Mason county, Kentucky, where it was raised, to Louisville, Ky., and there sold it; and that he so shipped and sold it, without the consent of the Burley Tobacco Society, a corporation which he and other poolers had selected as their agent to sell their tobacco, in accordance with the provisions of section 3 of said Act of 1906.

ASSIGNMENT OF ERRORS

First.—The court erred in holding that the provisions of chapter 103*a*, being section 3941*a*, Carroll's Kentucky Statutes, being the Act of March 21, 1906, and the amendment thereto of March 13, 1908, of the general laws of the state of Kentucky for the year 1908 and subsequent, are not in conflict with and in violation of the provisions of the 14th Amendment of the Constitution of the United States, for that the state of Kentucky by and through the provisions of said chapter 103*a* assumes and seeks:

(1) To deprive the plaintiff in error and certain other citizens of the United States and the state of Kentucky of rights, privileges and immunities secured to other citizens of the United States and said state;

(2) To deprive the plaintiff in error and other citizens of the United States of liberty and property without the due process of law;

(3) To deprive and deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the state of Kentucky of the equal protection of the law.

Second.—The court erred in holding that by the provisions of said Act the plaintiff in error is not deprived of rights and privileges and immunities secured to other citizens of the United States and the state of Kentucky, by the Federal Constitution and laws of the United States.

Third.—The court erred in holding that by the provisions of said Act the plaintiff in error is not deprived of liberty and property without due process of law.

Fourth.—The court erred in holding that the provisions of the Act do not deny to the plaintiff in error the equal protection of the law.

Fifth.—The court erred in holding that the said Act and the authority exercised thereunder, and thereby authorized to be exercised thereunder, is within the police powers of the legislature of the state of Kentucky.

Sixth.—The court erred in holding the provisions of said Act making it unlawful for the plaintiff in error to ship his tobacco out of Mason county, or sell same without first obtaining the consent of the American Society of Equity, or the Mason County Board of Control, to be within the police powers of the state.

Seventh.—The court erred in holding the provisions of said Act requiring plaintiff to procure said consent before shipping

his tobacco to Louisville, Ky., or selling it there, not to be an abridgement of the inalienable and constitutional right of plaintiff in error to pursue a lawful avocation in a lawful way without interference by the state.

Eighth.—The court erred in holding that the provisions of said Act do not unlawfully discriminate between those engaged in producing, handling or selling "pooled tobacco" and those engaged in producing, handling or selling other personal property.

Ninth.—The court erred in holding that the provisions of said Act do not cast special burdens upon those engaged in producing, handling or selling "pooled tobacco" in excess of those cast on persons producing, handling or selling other personal property or farm products.

Tenth.—The court erred in holding that said Act does not grant special and exclusive privileges to certain citizens which it denies to the plaintiff in error and to other citizens of the state.

Eleventh.—The court erred in holding that the provisions of said Act are uniform in their operation throughout the state upon all citizens of the state similarly situated, and that it does not deprive the plaintiff in error of the right to earn a livelihood in the pursuit of a lawful and harmless occupation and of the liberty of contract in reference to said business.

Twelfth.—The court erred in holding that the provisions of said Chapter 103*a* are not in violation of Section 8, Article 1, of the Constitution of the United States, which confers on Congress the exclusive power to regulate commerce among the several states.

Thirteenth.—The court erred in holding that the provisions of said Chapter 103*a* are not in violation of the provisions of the Act of Congress of 2 day of July, 1890, commonly known as the "Sherman Anti-Trust Act."

Fourteenth.—The court erred in ordering judgment to be entered assessing and confirming a fine against the plaintiff in error.

Fifteenth.—The court erred in ordering judgment to be entered, and in entering judgment against the plaintiff in error.

ARGUMENT

In 1890 the legislature of Kentucky passed an Act (section 3915, Kentucky Statutes) making it a penal offense for any person to become a member of, or party to, or in any way interested in, any pool, trust, combine, agreement, confederation or understanding with any other person, "for the purpose of regulating, or controlling, or fixing the price of any merchandise, manufactured articles, or property of any kind."

The Act of 1906 expressly permitted persons to combine unite or pool, any and all crops of wheat, tobacco, corn, oats, hay or other farm products raised by them, for the purpose of obtaining a higher price therefor than they could obtain by selling said crops separately.

The 1908 amendment to the Act of 1906 made it a penal offense for any person who had thus pooled his crop, to sell said crop.

If these statutes were to be literally construed, it is palpably evident that all owners of property other than farmers were denied the equal protection of the laws, under the opinion of this court in *Connelly* v. *Union Pipe Sewer Co., 184 U. S.,*

540. It would hence result either that the Act of 1906 was invalid, or that said Act operated as a repeal of the Act of 1890.

The Court of Appeals of Kentucky recognized this situation; and in its opinion in *Commonwealth* v. *International Harvester Co., 131 Ky., 551*, it put a construction on the pooling Act of 1906 which left in force the Act of 1890 and the Act of 1906.

This construction was arrived at in this way: Section 198 of the Constitution of Kentucky makes it the duty of the legislature to pass laws to prevent all pools, trusts and combinations organized to depreciate any article *below* its *real* value, or to enhance its cost *above* its *real* value.

In its opinion in *Commonwealth* v. *International Harvester Co., 131 Ky., 551*, the Kentucky Court of Appeals held that the Act of 1906 should be construed as authorizing farmers to pool their crops to enhance its price, but not above its *real* value. It held further that the Act of 1906 must be construed in connection with the 14th Amendment of the United States Constitution, as construed in *Connolly* v. *United States Sewer Pipe Co., 184 U. S., 540;* and therefore that the Act of 1906 meant to give to *all* owners of property, whether farmers or not, the right to form pools in order to enhance the price of their property, but not above its *real* value; that, therefore, the Act of 1890 was valid in so far as it prohibited the formation of pools to enhance or depreciate the value of property, provided the intended enhancement should be not *above*, and the intended depreciation should be not *below*, the *real* value of the property pooled.

Thus it was reasoned out by the Kentucky court, in the *Harvester Co. case*, that the International Harvester Company

might be convicted of a violation of the Act of 1890, not on the ground that it was illegal to pool, but that a pool to enchance the price of a product *above* its real value violated that Act; and in the present case that the plaintiff in error might be convicted of a violation of the Act of 1908, for refusing to remain in a pool, organized to enchance the value of leaf tobacco, for the reason that the indictment charged that the purpose of the pool was not to enhance the value of leaf tobacco *above* its *real* value.

It was expressly held in *Commonwealth* v. *International Harvester Co., 131 Ky., 571*, that the legislature of Kentucky did not intend, by the Act of 1906, to discriminate between farmers and other owners of property, but that its intent and purpose was to confer upon all owners of property the right to combine for the purpose of selling their property at a higher price, provided that the price they combined to sell it for did not exceed its *real* value.

How is it to be determined, under the Kentucky statute, whether a pool, or combination, or trust, is legal or illegal, formed for the purpose of enhancing the prices of commodities? The Kentucky court answers, in its opinion in that case, that it must be determined by considering whether the price of the commodity pooled, which the poolers were endeavoring to make it sell for, was its *real* value, or more than its real value. How is its real value to be fixed? The Kentucky court says, by determining what would have been its market value under normal conditions. How is it to be ascertained what would be the market value of a commodity under *normal conditions?* The Kentucky court answers by evidence as to what the commodity would have sold for under ordinary, normal condi-

tions unaffected by any combination of producers or dealers, *i. e.*, buyers or sellers, whose object is to create an abnormal condition in the market. In other words, the pivotal question to be determined in ascertaining whether a person has commited a crime under the Act of 1890 in entering into a pool, or under the Act of 1906–8 in withdrawing from a pool, is, not whether the pool was formed for the purpose of raising prices, or lowering prices, but was the price at which the poolers were endeavoring to sell, or buy, the commodity, higher or lower than what that price would have been, provided no endeavor had been made by any other set of poolers to raise or lower the price, and provided, further, that no other abnormal conditions existed which would naturally raise or lower the market price. What conditions are so abnormal as to raise or lower prices, the statutes of Kentucky do not describe, nor does the Court of Appeals put such a construction on the statutes as to make it throw any light on that subject.

The result is, that a man might be convicted for violating the Act of 1890 for entering into a pool to enhance the price of manufactured tobacco, above its real value, and again convicted, under the Act of 1906–8 for withdrawing from that pool, because another jury might think that, although the purpose of the pool was to enhance the price of manufactured tobacco, yet that the price that the poolers were endeavoring to advance it to, was not higher than its real value, or rather, was not higher than what its market value would have been, in case there had been no abnormal conditions to raise or lower its price.

Thus, under the pooling statutes of Kentucky, as construed by the Kentucky Court of Appeals, the guilt or innocence of a person, charged with a violation thereof, is made to depend

upon the existence of something that is not susceptible of proof by evidence. This something is—what *would be* the market value of certain products under conditions other than those that exist. That something is not a *knowable* fact; and evidence, direct or circumstantial, could no more be introduced to prove it, than could evidence be introduced to prove what will be the market value of corn one hundred years from now. The fact to be proved in order to establish guilt or innocence, is not simply *difficult* to be proved by any evidence, direct or circumstantial, but *impossible* of proof. In truth, it would be more proper to say that guilt or innocence, under the Kentucky pooling statutes, does not depend upon a fact which is capable of being proved by evidence, but upon a *surmise* as to what would probably or possibly have been a fact, in the event other conditions had existed, than such as did exist when the alleged criminal act was committed.

Law is a rule of action prescribed by a sovereign for his subjects. It is a paradox, a contravention in terms, to say that a rule, which is not only unknown but unknowable, is law.

The Kentucky Court of Appeals, in above cited case, holds, in substance, that it is a question for a jury to decide, whether the price that poolers were trying to get was above or below the real value of the commodity they pooled; *i. e.*, whether the price they were trying to get was above or below what would have been the market value of the commodity under conditions that did not exist. But, in the nature of things, evidence is not admissible to prove something to be a fact, which is unknowable. "It is certain that no court would listen to an attempted presentation of that which it considered not knowable." *1 Wigmore on Evidence, sec 1, note 2.*

What was the market value of an article, at a certain time in the past, is capable of proof. But what would have been its market value at that time, if conditions had been then different from what they actually were, is speculation and surmise.

A statute which makes the guilt of a person charged with crime hinge on something which is unknowable, violates the due process of law clause of the 14th Amendment to the Constitution of the United States.

On this ground we submit that the Kentucky statute, under which plaintiff in error was convicted, is invalid, and the judgment of the Court of Appeals of Kentucky is erroneous and should be reversed.

The Kentucky statutes, under which the judgment now under review was rendered, are in violation of the Sherman Anti-Trust Act and therefore void. The purpose of the Kentucky statutes, as construed by the Court of Appeals of Kentucky, is to legalize the pooling of farm products in order to enhance their price. It is true that this enhancement must be limited to the real value of the commodity. But the Act of Congress forbids the pooling of commodities that are subjects of interstate commerce. And the circumstance that the object of the pool was to enhance the price of the commodity only up to its real value, will not withdraw it from the inhibition of that statute. There is nothing in the Sherman Act that exempts from its inhibition contracts and combinations in restraint of interstate trade, entered into for the purpose of increasing the price of property up to its real value only, or down only to its real value.

The very purpose of the Kentucky statutes, and of the contract made pursuant thereto, which plaintiff in error is charged with having violated, was to restrain trade in leaf tobacco, in other words, to restrain the owners of such tobacco from selling it. The purpose, further was to monopolize the trade in leaf tobacco, by legalizing contracts between owners of it, not to sell it, but to appoint a common agent to sell it for them. This purpose is apparent on the face of the statute, and is declared by the Kentucky Court of Appeals in construing it in *Owen County Burley Tobacco Society* v. *Brumback*, *128 Ky.*, *137*, where it is said:

> "It is manifest that the real and in fact only object of the act was to enable the producers, by pooling and combination, to obtain better prices than they could get if they sold their products separately and as individuals, and the right to select, grade, store, and hold, is merely a means to the accomplishment of the chief end, which is to get a greater price. * * *
>
> "The end to be accomplished was to control, regulate, and fix the price, by placing all the crops in the hands of a central agent with power to hold them until a reasonable and adequate price could be obtained."

The same construction was put on these statutes in *Commonwealth* v. *Hodges*, *137 Ky.*, *233*, and in the present case.

Under the construction put on this Act by the Kentucky Court of Appeals in *Commonwealth* v. *International Harvester Co.*, *131 Ky.*, *551*, and *Commonwealth* v. *Hodges*, *137 Ky.*, *233*, all owners of any kind of products—whether farmers or not,—are given the same rights to pool and monopolize that are given, in terms, by the Act to producers of farm products. So that, manufacturers of coal oil, (like the Standard Oil Company, and its constituent companies,) and manufacturers of to-

bacco, (like the American Tobacco Company, and its constituent companies,) are given the right, by the Kentucky statutes, to form pools and combinations for the purpose of enhancing the price of their commodities and monopolizing the trade therein, provided only that the price they combine to get is no more than the real value of their property.

The decision of this court in *United States* v. *Patten, 226 U. S., 523*, is decisive of the present case. The only difference between the question presented in that case and the one in the present case, is, that in the present case the pool or corner in leaf tobacco was attempted to be legalized by the Kentucky legislature, whereas in that case the state of New York had not attempted to legalize the corner in cotton. But the commodity attempted to be cornered in this case is as much a subject of interstate commerce as was the commodity attempted to be cornered in that case. There the corner was to be conducted on the Cotton Exchange in New York, and here the corner was to be conducted in Kentucky, but the purpose of this corner, as well as the purpose of that corner, was to restrain any and all trade, interstate and intrastate, in the commodity cornered, and to prevent the selling of it and its passing into the channels of commerce, until a certain fixed price could be obtained for it. In the present case, plaintiff in error was convicted for transporting his tobacco from Mason county to Louisville, Ky., and there selling it.

Says this court in *United States* v. *Patten, 226 U. S., 525:*

> "The commodity to be cornered was cotton, a product of the southern states, *largely used and consumed in the northern states.* It was *a subject of interstate trade and commerce*, and through that channel it was obtained from

time to time by the many manufacturers of cotton fabrics in the northern states. The corner was to be conducted on the Cotton Exchange in New York City, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price *to all buyers in every market of the country.* This control and the enhancement of the price were features of the conspiracy upon the attainment of which it is conceded its success depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and bring within its dominating influence the entire cotton trade of the country.

"Bearing in mind that such was the nature, object and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and materially impede and burden the due course of trade and commerce among the states and therefore inflict upon the public the injuries which the anti-trust act is designed to prevent. See *Swift & Co.* v. *United States, 196 U. S., 375, 396–400; Lawe* v. *Lawler, 208 U. S., 274; Standard Oil Co.* v. *United States, 221 U. S., 1; United States* v. *American Tobacco Co., Ibid., 106.* And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. *Addyston Pipe & Steel Co.* v. *United States,*

175 U. S., 211, 243; United States v. *Reading Co., 226 U. S., 324, 370.*

We respectfully submit that the reasoning of that opinion is decisive of the present case. The state of Kentucky cannot make legal and valid a contract which an Act of Congress declares to be illegal and invalid. Nor can the state of Kentucky make the withdrawing from a contract a penal offense, when the laws of the United States makes the contract itself illegal and void.

The error of the Kentucky Court of Appeals in the present case and in the *Hodges case, 137 Ky., 233*, was in assuming that a contract made between citizens of one state could not be a contract in restraint of interstate trade. This is a palpable misconstruction of the Sherman Anti-Trust Act. The contract or combination which that Act makes unlawful may be a contract between two parties who reside in the same state. But if its *purpose* be to restrain the making of other contracts between citizens of different states, then it is prohibited by that Act.

A reversal of the judgment of the Court of Appeals of Kentucky is respectfully asked.

E. L. Worthington

J. W. Rollins

Counsel for Plaintiff in Error.

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Supreme Court of the United States

THOMAS MALONE, _ _ _ _ _ _ *Plaintiff in Error,*

vs.

COMMONWEALTH OF KENTUCKY, _ *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

May it please the Court:—

STATEMENT.

On March 31, 1909, the grand jury of Mason County, Kentucky, returned in the Mason Circuit Court, an indictment against plaintiff in error, Thomas Malone, charging him with the offense "of unlawfully and knowingly selling and disposing of a crop of pooled tobacco, without the consent of the authorized agent to sell and dispose of same", contrary to the Kentucky Statutes in such cases made and provided. (Pages 3 and 4 of Transcript of Evidence.)

To this indictment the defendant filed a demurrer, alleging, among other things, that the Statutes of Kentucky, under which the indictment was found, was in conflict with the Fourteenth Amendment to the Constitution of the United States, in that they denied the defendant

the equal protection of the laws and deprived him of his liberty and property, without due process of law and that such statutes were in violation of the interstate commerce clause of the Constitution of the United States and the Sherman Anti-Trust Act. The demurrer was overruled and a trial had which resulted in a verdict imposing a fine upon plaintiff in error of $150.00, and judgment was entered upon this fine. From this judgment an appeal was taken to the Court of Appeals of Kentucky, the court of last resort in that state, and on the 13th day of January, 1911, that court delivered an opinion affirming the judgment of the Mason Circuit Court. The opinion will be found on pages 29-30-31 and 32 of Transcript. 141 Ky., 564. From this judgment of affirmance the plaintiff in error has prosecuted an appeal by writ of error to this court.

The assignment of error contains fifteen grounds against the judgment of the Court of Appeals of Kentucky. In his brief, however, plaintiff in error, relies upon only two grounds. The first is that the standard fixed for determining the guilt or innocence of the defendant in a prosecution under the Kentucky Statutes, is so vague and indefinite as to render it impossible of proof, and a conviction under such statutes violates the due process of law provision of the Fourteenth Amendment to the Constitution of the United States. The second ground relied upon is that the statutes under which the conviction was had, are in violation of the Act of Congress of July 2, 1890, commonly known as the Sherman Anti-Trust Act, and are, therefore, invalid.

HISTORY OF KENTUCKY ANTI-TRUST LEGISLATION.

In order to arrive at a correct solution of the questions involved on this appeal, we think it advisable that there be presented a brief statement of the history of the Kentucky Anti-Trust Legislation.

It is a well known fact that Kentucky is an agricultural state, a large portion of its wealth being in farm lands. In this state, as in many others, certain combinations were formed by manufacturers by reason of which monopolies were established in certain manufactured articles, and the price of those articles were fixed to the users of same at a price greatly in excess of their actual value and greatly in excess of the price before the combination was formed. The users of those articles were compelled to buy, and compelled, by necessity to pay the price fixed. Combinations were also formed for the purpose of buying agricultural products, and the result was (and this applied mainly to tobacco) that the raisers of the products had but one purchaser. The consequence was that the agricultural products were, of necessity, sold at a price below their real value, and even at a price less than the actual cost of production. This condition resulted in serious injury to the State, in many cases forcing absolute bankruptcy upon its citizens.

To rid the State of this intolerable condition, its Legislature, prior to the enactment of the Sherman Anti-Trust Law, to-wit, on May 20, 1890, enacted what is known as the Kentucky Anti-Trust Law, which is contained in Section 3915-3921, inclusive, of Kentucky Statutes, Carroll's Edition. This statute, in substance, prohibited "any combination, trust or agreement for the

purpose of regulating, controlling or fixing the price of any merchandise, manufactured article, or property of any kind", and provided certain penalties for violation of this law. A new Constitution for Kentucky was adopted in 1891, and it also provided for the conditions still existing, by providing in Section 198, as follows:

> "It shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value."

The Act of May 20, 1890, was not repealed nor in any manner affected by the Constitution of 1891, but remained in full force and effect, as was held by the Court of Appeals in case of Commonwealth v. Grinstead, 108 Ky., 59, and Commonwealth v. Inter-National Harvester Company, 131 Ky., 551. It was found that the Act of 1890 did not produce the results hoped; that those unlawful combinations still continued and the injury resulting from them was aggravated rather than decreased. The Legislature concluded to enable the producers of agricultural products to meet the combinations which were ruining them by permitting them to pool their products, and the Act of March 21, 1906, and an amendment to same of March 13, 1908 was adopted. Both Acts being amendments to the act of May 20, 1890.

Those acts, in substance, permit the raisers of agricultural products to pool same and to appoint an agent to sell the product for a fair and reasonable price, and punishes by fine, any person who contracts to put his

crops in a pool and in violation of his contract, sells his pooled crop, and punishes any person who buys a crop from other than the regularly appointed agent, knowing the crop to have been pooled.

The Court of Appeals of Kentucky in construing those various enactments, have held in Commonwealth v. International Harvester Company of America, 131 Ky., 571, and in numerous other cases, that the Acts of 1906 and 1908 were amendments to the Act of May 20, 1890, and that by virtue of those enactments, pools and combinations could be formed in Kentucky where the purpose and effect of the combination or pool was to sell the pooled property, manufactured or agricultural, at its real or market value, but it further held that if the pool or combination was formed for the purpose of, and did sell the property pooled for more than its real or market value or for the purpose of buying property at less than its real or market value, then such pool or combination was condemned by the Kentucky Statutes, and those found guilty of so doing, could be punished by fine.

In the case of International Harvester Company of America v. Commonwealth, 147 Ky., page 564, the Court of Appeals of Kentucky in discussing the effect of the decision in case of Commonwealth v. International Harvester Company of America, 131 Ky., 561, says:

> "Indeed, by the opinion in that case it was not only held that the sections, supra, (that is the Act of May 20, 1890 and March 21, 1906) were not in conflict with the Fourteenth amendment to the Federal Constitution, but that by construing section 3941a (act of March 21, 1906) as an amendment to section 3915 as was evidently intended by the Legislature, they could properly be and were harmonized. In effect the same conclusion had been arrived at by

the court in the case of Owen County Burley Tobacco Society v. Brumback, 128 Ky., 137.

"It may be said, that since these two cases were decided, there is no law in this State which forbids the existence of trusts, pools or combinations, or that prohibits them from fixing and maintaining the price or prices of their products or commodities so long as they are not sold for more or less than their real or market value."

By the amendment of March 13, 1908, it is provided that any person who is a member of a pool, and who sells his product outside of the pool is guilty of a misdemeanor, and if convicted, shall be fined not exceeding $250.00, and any person who knowingly purchases pooled property from one other than the agent of the pool, shall if found guilty, be punished in a like manner. The reason for imposing a fine, by criminal proceedings, against any one who violated the provisions of the pooling act in regard to selling or purchasing pooled property, was that many of the persons entering into the pool, particularly of agricultural products, were insolvent and could not be held financially responsible in damages for any injury sustained by violation of their pooling contract. It was believed that those organizations which had heretofore controlled the prices of agricultural products would endeavor to make the pooling of agricultural products unsuccessful, and one of the means so to do would be to induce members who were financially irresponsible, to sell their crops to one of those organizations and in that manner weaken or destroy the pool, and render ineffectual its purposes, and to meet that situation the criminal part of the act was added. See Owen County Board of Control v. Brumback, 128 Ky., 137, and Commonwealth v. Hodges, 137 Ky., 233, for history and reason for this legislation.

We insert Section 3915 of the Act of May 20, 1890, and the Acts of March 21, 1906 and of March 13, 1908, amendatory thereto. The remaining sections of the act of May 20, 1890, referred to the manner of prosecuting violations of section 3915 and we, not deeming them material to the questions here involved, do not insert them.

Section 3915 of the Kentucky Statutes is as fol lows:

> "That if any corporation organized under the laws of Kentucky, or under the laws of any other State or country, for transacting or conducting any kind of business in this State, or any partnership, company, firm or individual, or other association of persons, shall create, establish, organize or enter into, or become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation or understanding with any other corporation, partnership, individual or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles or property of any kind, or shall enter into, become a member of, or party to or in any way interested in any pool, agreement, contract, understanding, combination or confederation, having for its object the fixing, or in any way limiting the amount or quantity of any article of property, commodity or merchandise to be produced or manufactured, mined, bought or sold, shall be deemed guilty of the crime of conspiracy, and punished therefor as provided in the subsequent sections of this act."

The Act of March 21, 1906, Ky. Stats., Section 3941a, is as follows:

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky*:

"§ 1. It is hereby declared lawful for any number of persons to combine, unite or pool, any or all of the crops of wheat, tobacco, corn, oats, hay, or other farm products raised by them, for the purpose of classifying, grading, storing, holding, selling or disposing of same, either in parcels or as a whole, in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually.

"§ 2. That contracts or agreements made or entered into by persons with each other, the object or intent of which is to unite, pool or combine all or any of the crops of tobacco, wheat, corn, oats, hay, or other farm products, raised by such persons, for the purpose of classifying, grading, storing, holding, selling or disposing of said crops, or any of them, either in parts or as a whole, in order, or for the purpose of obtaining a better or higher price therefor than could or might be obtained by selling said crops separately or individually, are hereby permitted, and shall not, because of any such combination or purpose of said persons, be declared illegal or invalid.

"§ 3. Such persons so entering into such agreement or contract as is set out in the foregoing sections, are hereby permitted to select an agent or agents through or by or with whom said parties so entering into such agreements may classify, grade, store, hold, sell or dispose of said crops, or any of them, and said agent or agents shall have the right to take, receive, hold, store, classify, grade, sell or dispose of said crops so placed in such agreement as directed or authorized by their principal, for the purpose of accomplishing the obect of such combination or agreement between such principals, and contracts and agreements entered into by such agent or or agents for the purpose of classifying, grading, storing, holding, selling or disposing of said crops so combined, united or pooled, either in parcels or as a whole, are hereby permitted, and shall not, because of any such combination or purpose of such original agreement of such principals so entering

into said combination, or of such agent or agents, be declared illegal or invalid."

The Act of March 13, 1908, is as follows:

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky*:

"§ 1. That section 3 of an act entitled, An Act permitting persons to combine or pool their crops of wheat, tobacco and other products, and sell same as a whole, and making contracts in pursuance thereof valid, approved March 21, 1906, being Chapter 117 of the Acts of the General Assembly of the Commonwealth of Kentucky for the year 1906, be and the same is hereby amended and re-enacted so as to read as follows:

"Such persons so entering into such an agreement or contract as is set out in the foregoing sections are hereby permitted to select an agent or agents through or by or with whom said parties so entering into such agreement may classify, grade, store, hold, sell, or dispose of said crops, or any of them, and said agent or agents shall have the right to take, receive, hold, store, classify, grade, sell or dispose of said crops so placed in said agreement, for the purpose of accomplishing the object of such combination or agreement between such principals, and contracts and agreements entered into by such agent or agents for the purpose of classifying, grading, storing, holding, selling or disposing of said crops so combined, united or pooled, either in parcel or as a whole, are hereby permitted, and should not, because of any such combination or purpose of such original agreement of such principals so entering into said combination, or of such agent or agents, be declared illegal or invalid. All contracts heretofore made by any person or persons for the purpose set out in the foregoing sections are hereby declared valid, if otherwise legally binding on the parties. To prevent any breach or violation of any contract made for the purpose set out in the foregoing sections a restraining order and writ of injunction may

be issued by proper officer, as prescribed in the Civil Code of Practice.

"For any breach or violation of any contract entered into for the purpose set out in the foregoing sections, the injured party may recover the damages sustained by him by reason of such violation of such contract of the person violating the same, and also of any person who shall induce or persuade another to violate such contract, which damages shall include the reasonable expense and attorney fee incurred by the injured party in prosecuting an action to recover such damages or to prevent a violation of such contract, if the party complaining shall succeed in doing so which may be recovered in the same action or original proceeding. Said agent when so selected as herein provided, shall have the sole right to sell said crops so pooled or combined, and it shall be unlawful for any owner of such crops to sell or dispose of same and for any person to knowingly purchase the same without the written consent of such agent, and upon conviction thereof, he or they shall be fined in any sum or amount not exceeding $250.00 for each offense, to be fixed by the jury in their discretion."

ARGUMENT.

(The record in the case shows that the plaintiff in error did execute what was commonly known as a pooling contract; that he disposed of his tobacco by loading it upon a railroad car and shipping it to market at Louisville, Kentucky.

It is stated in brief for the plaintiff in error that the tobacco was shipped to and sold at Cincinnati, Ohio. This statement is evidently an oversight, as Patrick Collins, a witness introduced by the State at the trial, states positively that the tobacco was shipped from Mason County, Kentucky, to Louisville, Kentucky, and there sold. This is the only witness testifying upon this point.

It matters not what was done with it, the offense was committed when plaintiff in error disposed of it in violation of section 3941-a, Kentucky Statutes, and without the consent of the agent in charge for the purpose of selling. If the tobacco had been shipped and sold at Cincinnati, Ohio, the contract and statute could in no wise be affected. The Kentucky Statutes does not attempt to punish for shipping tobacco. It only says that when a person assigns farm products to a common agent to sell, &c., and then disposes of the article so assigned without the consent of the agent, the penalty will attach. This is not in violation of the Interstate Commerce Statute.

This transaction is purely one of intrastate commerce. The tobacco in question was grown in Mason County, Kentucky; the parties to the contract resided there; the agent to which it was assigned resided there; by positive proof the tobacco was shipped from a point in Mason County, Kentucky, to Louisville, Kentucky, and the offense committed and completed by plaintiff in error in said Mason County, Kentucky, when he disposed of the tobacco without the consent of the agent and in violation of section 3941-a, Kentucky Statutes.

Thus it is seen that the entire transaction transpired wholly within the State of Kentucky, and is purely intrastate.)

By the construction placed by the Kentucky Court of Appeals upon enactments above set out, any number of persons or corporations, whether engaged in agricultural pursuits or in manufacturing, or other business, may combine together for the purpose of selling the articles they own or control, at a fair market value and

can combine for no other purpose. And this right, as heretofore said, is given all persons and corporations, irrespective of the character of business in which they are engaged. There is no discrimination made. All have the protection of the same law, and all are held responsible in the same manner to the same law. The act discriminates against no person or corporation and gives no person or corporation any exclusive privilege or immunity.

By this construction, objections to such legislation as was pointed out by this court in Connolly v. Union Sewer Pipe Co., 184 U. S., 539, page 46 L. Ed., 679, are avoided, and that case is in no manner an authority against those enactments, and this is practically admitted by counsel for plaintiff in error in their brief.

In Orr v. Gillman, 183 U. S., 275, page 46 L. Ed., 196, this court in speaking of the construction placed upon a New York statute by a court of last resort in New York, says:

> "These views of the Court of Appeals must be accepted by us as accurate statements of the law of the State; and though it is claimed in the brief of counsel for the plaintiff in error that such a construction of the transfer tax law brings it into conflict with the 14th Amendment of the Constitution of the United States, we are unable to approve such a contention. The subject dealt with is one of state laws expounded by state courts. The laws and the construction put upon them apply equally to all persons in a like situation, and cannot be regarded as conflicting with the provisions of the Federal Constitution. Magoun v. Illinois Trust & Savings Bank, 170 U. S., 283, 42 L. Ed., 1037, 18 Sup. Ct. Rep., 594."

It is settled beyond controversy that this court will consider a state act in the light of the construction placed

upon it by the court of last resort of the state, and while this court might differ with the state court as to the proper construction of the act as an original proposition, yet it is bound by the state court's construction. Elmendorf v. Taylor, 10 Wheaton, page 289; L. Ed., Orr v. Gillman, 183 U. S., 283.

For the reasons heretofore stated a fine was imposed upon any person who, having pooled his tobacco, sold same without the consent of the pool agent. It seems to us that this was not in any sense an arbitrary interference with private business or transactions, but was an endeavor to carry out the policy of the statute which was to enable the raisers of agricultural products to receive a fair price for same, and to prevent an excessive price being required for necessary articles, manufactured either in or outside of the State. Whether this policy meets the approval or disapproval of this court is not the question. The question is whether this is such an arbitrary interference with private business as to bring it within the prohibition of the Fourteenth Amendment of the Constitution of the United States.

In Otis & Gassman v. Parker, 187 U. S., page 47 L. Ed., 323, the following language was used by Mr. Justice Holmes on page 327 L. Ed. of the opinion:

> "It is true, no doubt, that neither a State Legislature nor a State Constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health, or morals, is not conclusive upon the courts. Mugler v. Kansas, 123 U. S., 623, 661; 31 L. Ed., 205, 210; 8 Sup. Ct. Rep., 273; Lawton v. Steele, 152 U. S., 133, 137, 38 L. Ed., 385, 388; 14 Sup. Ct. Rep., 499. But general propositions do not carry us far. While the

courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for difference of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et al omnibus.*

"Even if the provision before us shall seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adpotion to have expressed a deep seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the court cannot interfere, unless, in looking at the substance of the matter, they can see that it "is a clear, unmistakable infringement of right secured by the fundamental law."

And again in Chicago B. & Q. R. Co. v. McGuire, 219 U. S., 547, beginning on page 55 L. Ed., 339, the Supreme Court of the United States, through Mr. Justice Hughes uses the following language on page 339 of the opinion:

"The principles involved in these decisions are that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the Legislature transcends the limit of its power in interfering with liberty of contract; but where there is a reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is

not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether in short, the legislative discretion was in its prescribed limits should be exercised in a particular manner, are matters for the judgment of the Legislature, and the earnest conflict of serious opinions does not suffice to bring them within the range of judicial cognizance."

The principle was thus stated in McLean v. Arkansas, supra, pp. 547 and 548:

> "The Legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the Legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of the legislative power (Cases cited) * * * If there existed a condition of affairs concerning which the Legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fall."

STANDARD ADOPTED TO DETERMINE WHETHER OR NOT THERE HAS BEEN A VIOLATION OF THE KENTUCKY ANTI-TRUST LAW, IS FIXED AND CERTAIN.

It is objected by plaintiff in error that the standard fixed to determine the guilt or innocence of one charged

with violating the anti-trust laws of Kentucky is impossible to be ascertained, and therefore any punishment inflicted under such statutes violates the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The Statutes, as construed by the Court of Appeals, provide that if a combination is formed for the purpose of increasing the price of the article above its real value, then the combination is an illegal one. If the purpose of the combination is to depreciate the price of the article below its real value, then the combination is illegal. The standard fixed is the real value of the article. The real value, as stated by the Court of Appeals of Kentucky, International Harvester Company of America v. Commonwealth, 137 Ky., 551 and in same case 144 Ky., page 403, is the market value. How is the market value determined? By the value of the article upon an open market. Where there is no open market for a particular article by reason of combinations and agreements concerning same, how can the market value of such article be ascertained at such time?

The Court of Appeals of Kentucky in International Harvester Company of America v. Commonwealth, 137 Ky., page 551, and same case in 144 Ky., page 403, says the market value may be ascertained under such circimstances by first ascertaining the price before the combination in an open market. This is the market value. Then if after the combination, the price has been increased without a corresponding increase in the price of labor required in the manufacture or raising of the article, or a corresponding increase in the price of the raw material going into the article (if a manufactured product) and the business conditions are normal, then the increase in price is above the market value.

If the charge is that the price is below the market value, the standard is determined by finding whether there has been a decrease in the cost of labor, etc., corresponding with the decrease in price of the article and whether the business conditions are normal. If there has been no decrease in price of labor, etc., and conditions are normal, then it may properly be concluded the price of the article is below its market value.

In this way the standard is definitely fixed and while as said in Commonwealth v. International Harvester Co., 131 Ky., 551, "Different juries might form different conclusions upon the same facts. What they might do is proverbially uncertain, nevertheless, the 'standard erected by law' is not uncertain."

Counsel for plaintiff in error is in error in contending that the market value of the article under conditions existing in the instant case is not a *knowable* fact.

KENTUCKY STATUTES DO NOT VIOLATE THE FEDERAL ANTI-TRUST ACT.

It is insisted that the Kentucky Statutes, under which was had the conviction of plaintiff in error, are in violation of the Federal Anti-trust Act, and, therefore, void. When it is kept in mind that the Kentucky Statutes only permit the pooling of manufactured articles, or agricultural products, for the purpose of obtaining the real or market value of same, and it is a violation of those statutes to pool for the purpose of obtaining a price in excess of the value of the article, or to depreciate the price below the value of the article, it seems a novel proposition to maintain that such statutes are violations of any Federal law. The very purpose of the Kentucky Statutes being to provide against the evils which are aimed at by the Federal Statutes.

This court in the case of the Standard Oil Company v. United States, 221 U. S., at page 58, 55 L. Ed., 664, after having reviewed the history of trust legislation in England, as well as in the United States, summed up its views of the common law and the legislation upon this subject, in the following language:

> "Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of price and of the wrongs which it was thought would flow from the undue limitation of competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were *unreasonably restrictive of competitive conditions*, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the *legitimate purpose of reasonably forwarding personal interest*, and developing trade, but on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evil such as enhancement of prices, which were considered as against public safety. It is equally true that the survey of the legislation in this country on this subject from the beginning, will show, depending as it did upon the economic conceptions which obtained at the time the legislation was adotped or judicial decision rendered, that contracts or acts were at one time to be of such a character as to justify the inference of wrongful intent, which were at another period thought not to be of that character."

In defining the words "to monopolize" and "monopolize," this court in the same case, at page 61, used the following language:

"Undoubtedly the words 'to monopolize' and 'monopolize' as used in the section reach every act bringing about the prohibited result. The ambiguity, if any, is involved in determining what is intended by monopolize, but this ambiguity is really dispelled by the light of the previous history of the law of restraint of trade, to which we have referred, and the indication which it gives of the practical evolution by which monopoly and the act which produces the same result as monopoly, that is, *undue restraint of the course of trade,* all come to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, *unduly* restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibition of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraint of trade by any attempt to monopolize, monopolization thereof, even though the act by which such results are attempted to be brought about, or are brought about, be not embraced within the general enumeration of the first section, and of course, when the second section is thus harmonized with and made, as it was intended to be, the complement of the first, it becomes obvious that the criterion to be resorted to to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the *rule of reason* guided by the established law and by the plain duty to enforce the prohibition of the act, and thus, the public policy which its restrictions were obviously enacted to sub-serve."

Therefore, we find that this court has construed the Federal Statutes to mean undue restraint of trade, while the Kentucky courts have construed the statute in question to prohibit combinations which will increase property above its real value, or diminish it below its real value, or, in other words, that will unduly (as was said by this court) enhance the value of the article. Ap-

plying the rule of reason to the construction given the Kentucky Statutes by the Kentucky Court of Appeals, it is in harmony with the construction given to the Federal Statutes by this court.

Believing as we do, that the Kentucky Statute, as construed by the Kentucky Court of Appeals, is in harmony with the organic law of the State of Kentucky, and is also in harmony with the Federal law upon the same subject, and the construction given to the Federal law by this court, we respectfully ask the court to affirm the opinion of the Kentucky Court of Appeals.

James Garnett

Attorney General.

MALONE v. COMMONWEALTH OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 36. Submitted April 22, 1914.—Decided June 22, 1914.

141 Kentucky, 570, reversed on the authority of the preceding case.

THE facts are stated in the opinion.

Same counsel as in *Collins* v. *Kentucky*, *ante*, p. 634, and argued simultaneously therewith.

MR. JUSTICE HUGHES delivered the opinion of the court.

This writ of error has been sued out to review a judgment of the Court of Appeals of Kentucky which affirmed the conviction of Thomas Malone, the plaintiff in error, for selling pooled tobacco, without the consent of the agents of the pool, contrary to § 3941*a* of the Kentucky statutes. 141 Kentucky, 570.

The case is the same in all material respects as that of *Collins* v. *Kentucky*, decided this day, *ante*, p. 634, with the exception that the tobacco in question was sold by the plaintiff in error within the State of Kentucky. For the reasons stated in the opinion in the *Collins Case*, the judgment must be reversed.

Judgment reversed.